

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JUANA DEL REAL)	
Claimant)	
v.)	
)	Docket Nos. 1,068,697
SAM'S CLUB)	& 1,068,698 ¹
Respondent)	
and)	
)	
NEW HAMPSHIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the May 12, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Claimant appears by Michael R. Lawless of Lenexa, Kansas. Respondent appears by Michael R. Kauphusman of Overland Park, Kansas.

ISSUE

The ALJ found claimant's February 1, 2014, work accident was the prevailing factor in causing the need for additional right knee treatment, consisting of injections and a possible total knee arthroplasty (TKA). The ALJ ordered respondent provide the requested right knee treatment by a physician agreed upon by the parties.

Respondent admits claimant's accident caused a compensable right knee meniscal injury, for which she was treated and achieved maximum medical improvement (MMI). But, respondent contends the accident did not cause the advanced arthritis in her right knee that necessitated the treatment she requests. Respondent maintains the ALJ incorrectly rejected the opinion of Lowry Jones, M.D., and argues claimant failed to prove by a preponderance of the credible evidence the treatment she seeks was more likely than not caused by the accident.

¹ Docket No. 1,068,697 alleges an accident on February 1, 2014. Docket No. 1,068,698 alleges a series of repetitive trauma from 1997 to February 1, 2014. Both docket numbers were scheduled for preliminary hearing and the ALJ's Order encompassed both claims. The application for Board review also sets forth both docket numbers. The preliminary hearing Order found there was only a single traumatic injury, not a series. The parties do not dispute that portion of the order.

Claimant asserts her accident caused a new lesion or change in the physical structure of her body that requires further treatment. She urges the Board to affirm the ALJ's Order.

The issue is: was claimant's accident the prevailing factor causing the need for the medical treatment she requests?

FINDINGS OF FACT

Claimant, age 63, began working for respondent in 1997 as an after-hours stocker. She sustained personal injury by accident to her right knee while stacking boxes on February 1, 2014. At that time, she felt a "pop" in her knee and was unable to walk. Claimant had no right knee symptoms before her accident.

Claimant initially received conservative care, consisting of a knee immobilizer, crutches and medication. An MRI of her right knee was performed on February 7, 2014, that revealed effusion; a complex medial meniscus tear; severe patellofemoral compartment osteoarthritis; and focal moderate to high grade chondral thinning involving the weight bearing surface of the medial femoral condyle. An orthopedic consultation was recommended.

Dr. Humphrey's report

On February 19, 2014, claimant saw orthopedic specialist Mark Humphrey, M.D., who administered a Kenalog injection. In his narrative report, Dr. Humphrey stated:

An MRI study was made of the right knee. Juana Del Real has a right knee multidirectional tearing of the body and posterior horn of the medial meniscus.

Ms. Del Real has over the years developed degenerative arthritis, right knee, which is felt to pre-existing [sic] this work related injury. During the work related event she suffered a medial meniscus tear to the right knee. Her acute internal derangement symptoms and difficulty with pain and [walking] are felt to be associated with her meniscus tear. She may have additionally aggravated her underlying arthritic condition. Today she received a Kenalog injection. If sufficient relief is not obtained from this injection she needs right knee arthroscopy. The prevailing factor in her need for medical treatment and surgery is the traumatic work related injury.²

Dr. Jones' report and records

The ALJ appointed orthopedic surgeon Dr. Lowry Jones to perform a neutral medical evaluation. Respondent thereafter authorized Dr. Jones to provide treatment,

² P.H., Resp. Ex. C.

including a right knee arthroscopy performed on October 31, 2014, consisting of partial medial and lateral meniscectomies. In addition to the meniscus injuries, claimant was found to have advanced patellofemoral chondromalacia and grade 3 and 4 chondromalacia involving the medial femoral condyle. The arthroscopy included patellofemoral and medial condyle chondroplasties.

Dr. Jones opined claimant reached MMI on March 23, 2015.

At respondent's request, Dr. Jones rated claimant's permanent impairment of function. In Dr. Jones' opinion, claimant's meniscal injuries were caused by her work accident, but the advanced degenerative arthritis in her knee was preexisting and not caused by the accident. The doctor acknowledged the potential need for a TKA, but he concluded any such surgery was unrelated to her injury.

Dr. Koprivica's report

In December, 2014,³ P. Brent Koprivica, M.D., a licensed physician board certified in occupational medicine, evaluated claimant at the request of her counsel. Dr. Koprivica reviewed medical records, took a history, and performed a physical examination.

Dr. Koprivica's report noted claimant's presentation was medically complex. According to the doctor, claimant had preexisting degenerative disease in her right knee patellofemoral compartment that was asymptomatic prior to claimant's accident. Dr. Koprivica opined claimant's February 1, 2014, work injury was the prevailing factor in the development of her complex medial and lateral meniscus tears.

Dr. Koprivica asserted he found a new lesion or structural change relating to claimant's preexisting chondromalacia in her right medial femoral condyle. Dr. Koprivica provided the rationale for his opinion:

Ms. Del Real also had a new structural injury to the pre-existent chondromalacia involving the medial femoral condyle. At the time of the arthroscopy, which was approximately nine months after the injury, Dr. Jones noted the presence of fairly new fragmentation of the medial femoral condyle with Grade 4 changes. These are new structural injuries which flow from the injury on February 1, 2014, and for which I would consider the February 1, 2014, work injury to be the prevailing factor.

. . .

In terms of the complexity of the presentation, it is clear that the extent of degenerative disease in the right knee is a contributor to the current need for care and treatment. However, it is speculative to believe that this care and treatment

³ The record is unclear if Dr. Koprivica's examination occurred on December 8 or December 12, 2015.

would be necessary at this point but for the new structural injury sustained on February 1, 2014. It is also known clinically that the new medial meniscus tear as well as the new medial condyle fragmentation has resulted in permanent **acceleration** of the underlying degenerative process. (Emphasis added)

I would not view the injury on February 1, 2014, to represent merely the aggravation of the pre-existent degenerative disease. Rather, there are new structural injuries involving the medial and lateral menisci along with the fragmentation of the medial femoral condyle chondral surface that are necessitating further care and treatment needs at this point.⁴

Dr. Koprivica recommended Synvisc injections to improve knee function and reduce pain. The doctor asserted the next treatment step would be a TKA. Dr. Koprivica's report noted the treatment he recommended "flow as a direct necessity of the permanent injuries sustained on February 1, 2014."⁵ According to Dr. Koprivica:

Without the February 1, 2014, new injuries and for which the February 1, 2014, injury is the prevailing factor, it is speculative to state that the current treatment needs would exist.

I would consider Ms. Del Real's February 1, 2014, injury to be the prevailing factor necessitating these current treatment needs at this point. This represents reasonable medical treatment that flows as a direct necessity of the February 1, 2014, injury and has already been recommended by Dr. Jones.

I would consider the necessity for the total knee arthroplasty to flow as a result of the permanent **acceleration** of the underlying degenerative process along with the new structural injuries attributable to the February 1, 2014, injury.⁶ (Emphasis added)

Claimant's current symptoms include constant right knee pain, worsened by prolonged standing and walking. Claimant's greatest pain is accompanied by popping in the medial compartment when bending her knee. Claimant takes pain medication daily.

⁴ P.H., Cl. Ex. 1 at 12-13.

⁵ *Id.* at 13.

⁶ *Id.* at 14.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-508(d) states:

“Accident” means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. “Accident” shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f) provides in material part:

(1) “Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

K.S.A. 2013 Supp. 44-508(f)(2)(B) states:

An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is performed and the resulting accident;
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2013 Supp. 44-508(g) states:

“Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The parties agree claimant’s accident did not “solely” aggravate or accelerate claimant’s right knee pre-existing degenerative disease. The accident caused new lesions or changes in the structure of claimant’s body, specifically medial and lateral meniscus tears. Those injuries have been treated and claimant has achieved MMI.

The parties dispute whether claimant should undergo a TKA at respondent's expense.

At the outset, the undersigned Board Member notes neither Dr. Humphrey nor Dr. Jones, both orthopedics surgeons, currently recommend a TKA. Likewise, Dr. Koprivica did not suggest claimant presently undergo a TKA, but only Synvisc injections.

The causation opinion of Dr. Humphrey was primarily directed to the need for surgical repair of claimant's meniscus injuries, not a TKA. However, Dr. Humphrey's report did note claimant's right knee degenerative arthritis preexisted the work injury and it developed over the years.

Dr. Jones, the orthopedic surgeon who performed claimant's arthroscopic surgery, was initially appointed by the ALJ to conduct a neutral medical evaluation. Dr. Jones opined claimant's meniscal injuries were caused by her work accident, but the advanced degenerative arthritis in her knee was preexisting and not caused by the accident. The doctor referred to the potential need for a TKA, but concluded any such surgery was unrelated to claimant's accident.

When Dr. Jones performed the arthroscopy on October 31, 2014,⁷ approximately nine months after the accident, he noted the presence of fairly new fragmentation of the medial femoral condyle with Grade 4 changes.⁸

When Dr. Koprivica's evaluation is closely scrutinized, it is clear his opinion that claimant's accident caused the need for a TKA is conjectural at best.

According to Dr. Koprivica, who unlike Dr. Jones and Dr. Humphrey, apparently has no surgical experience, the accident was the prevailing factor causing fragmentation of the preexisting arthritis in claimant's medial femoral condyle which, in addition to the meniscus injuries, constituted a new change in the physical structure of claimant's body. Dr. Koprivica asserted this was not merely an aggravation of a preexisting condition.

The doctor based such opinion on: (1) an MRI report dated February 7, 2014, less than a week after the accident that showed severe patellofemoral compartment osteoarthritis, most pronounced laterally, and focal moderate to high-grade cartilage thinning involving the weight bearing surface of the medial femoral condyle and (2) a chart entry of Dr. Jones dated December 8, 2014, which refers to claimant having a "fairly new fragmentation of the medial condyle with Grade 4 changes."⁹ Dr. Koprivica did not explain

⁷ For some reason, the operative report was not placed into evidence.

⁸ P.H., Resp. Ex. A at 3.

⁹ P.H., Cl. Ex. 1 at 12, and Resp. Ex. A at 3.

how those fragments were caused by the work accident, nor did he explain why such fragmentation was not simply the advancement of claimant's severe arthritis, which is a degenerative condition that, by its nature, worsens on its own over time.

Dr. Koprivica's opinion is further weakened by the fact that claimant had severe right knee arthritis, including in the medial femoral condyle, both when the MRI was conducted and the arthroscopy was performed. No other medical records or reports support Dr. Koprivica's theory. As noted in the above quotes, and in the preliminary hearing Order, Dr. Koprivica twice used the word "acceleration," which further muddles his prevailing factor opinion.

The opinion of the Kansas Court of Appeals in *Le*¹⁰ makes clear that in order to prove a compensable claim, more than a sole aggravation must be proven, but the worker must also satisfy the prevailing factor requirement. Several Board decisions have denied TKA procedures when it was found preexisting arthritic conditions, not the accident, caused the need for the knee replacement. Although these issues are fact-driven and depend on the evidence adduced in each case, these claims have fact patterns and issues comparable to this claim.¹¹

This Board Member finds the causation opinions of Dr. Jones and Dr. Humphrey are more persuasive than those of Dr. Koprivica, and the preliminary hearing Order must be reversed.

CONCLUSION

Claimant's accident was not the prevailing factor causing the need for the medical treatment she requests.

AWARD

WHEREFORE, the undersigned Board Member finds that the order of Administrative Law Judge Kenneth J. Hursh dated May 12, 2016, is reversed.

¹⁰ *Le v. Armour Eckrich Meats*, 52 Kan. App. 2d 189, 364 P.3d 571, rev. denied __ Kan. __ (2015).

¹¹ See *Berkley Frye v. Angmar Medical Holdings, Inc.*, Nos. 1,059,923 & 1,059,925, 2012 WL 6101123 (Kan. WCAB Nov. 30, 2012); *Dempsey v. Saint Raphael Nursing Services, Inc.*, No. 1,065,128, 2014 WL 3055458 (Kan. WCAB Jun. 23, 2014); *Moore v. Jackson Farmers, Inc.*, No. 1,071,835, 2015 WL 996905 (Kan. WCAB Feb. 27, 2015); *Kornmesser v. State of Kansas*, No. 1,057,774, 2013 WL 3368484 (Kan. WCAB Jun. 14, 2013).

IT IS SO ORDERED.

Dated this _____ day of July, 2016.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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Honorable Kenneth J. Hursh, Administrative Law Judge